Collective Constitutional Learning in Europe: European Courts Talk to Hungary (Again)

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Renáta Uitz Do 10 Apr 2014

On April 8, 2014, the Grand Chamber of the European Court of Justice found that Hungary's cutting short the terms of office of its old data protection ombudsman with its new Fundamental Law violated the Data Protection Directive (C-288/12, Commission v Hungary), while the European Court of Human Rights found that Hungary's divesting of several previously registered churches from their church status under its new church law violated the Convention (Magyar Keresztény Mennonita Egyház and others v Hungary). The two judgments came two days after the Hungarian national elections in which the party of PM Viktor Orbán, FIDESz, won an overwhelming majority. While after the electoral victory PM Orbán emphasized that the renewed government will continue its work to preserve the achievements of the recent wave of constitution-making, these recent European judgments are clear reminders that there is still work to be done to bring the reinvented Hungarian constitutional and legal order in line with European minimum standards.

The European dimension of these recent developments is noteworthy, as the judgments arrive on the tails of the Commission's communication on a new EU Framework to strengthen the Rule of Law . This new Framework is the Commission's reaction to the Parliament's resolution of July 2013 on the situation of fundamental rights: standards and practices in Hungary, calling for the establishment of a mechanism which ensures continuing compliance with the common values of the EU, as expressed in Article 2 TEU. In her initial response Commissioner Reding was far from enthusiastic about embracing the Parliament's proposal, in September 2013, however, she outlined a formal notice procedure under Article 7 TEU (similar to the infringement procedures), while she mentioned that a farther reaching mechanism would take a treaty amendment. The Commission's new proposal from March 2014 is built on the premise that infringement procedures are an important instrument of enforcing EU law in the member states. Individual violations of fundamental rights are to be handled by the national judiciaries and through mechanisms in the European Convention on Human Rights system. For systemic violations (but not for individual breaches) which fall outside EU law the Commission envisions a new three-stage preventive and sanctioning mechanism, which could be activated in case of a "clear risk of a serious breach" of Article 7(1) TEU. This new three-stage process builds on continuing dialogue with the member states, and intense cooperation between expert bodies in the EU and the Council of Europe.

The two recent European judgments on Hungarian developments provide an important reality check on key components of the proposed EU Framework for the very national context which is largely credited for triggering the conversation on the need for a European mechanism to prevent the systemic decline of constitutional institutions in the member states. Both cases concern the evaporation of key constitutional guarantees and test the application of European minimum standards, as well as the capacity of European institutions to defend, restate and reinforce those standards in the face of fundamental changes introduced to a pre-existing legal framework which had been in place at the time when Hungary joined the elite clubs of European democracies. Both judgments were handed down amidst an ongoing exchange concerning these rules, after a relevant aspect of respective cases had already been assessed – respectively – by the Hungarian Constitutional Court, the European Commission as well as the Venice Commission, and the contested legal rules had been amended by the Hungarian Parliament in response to these interventions or to prevent further criticism.

The saga of the data protection ombudsman is relatively straightforward: the new Fundamental Law redefined the office of the ombudsman (officially: commissioner for fundamental rights). Data protection was not included in the mandate of the new ombudsman (Article 30, Fundamental Law). Instead, the newly adopted 2011 data protection act established the National Authority for Data Protection and Freedom of Information (Article 38). The Authority was meant to "collaborate with the bodies and persons defined in specific other legislation to represent Hungary in the joint data protection supervisory bodies of the European Union" (Article 38(4)(4)). The president of the Authority is appointed by the President of the Republic upon the proposal of the Prime Minister (Article

40(1)), for a 9-year term (Article 40(3)). The operative provisions of the 2011 data protection act on the Authority entered into force together with the new Fundamental Law on January 1, 2012 (Article 73(2)).

The data protection ombudsman (similarly to the chief justice of the Supreme Court) became the subject of a targeted and highly individualized liquidation effort through constitutional reform. When the Fundamental Law entered into force, the old data protection ombudsman elected by (the previous) parliament under the old data protection law had almost two years left of his 6-year tenure, until the end of September 2014. The Transitional Provisions to the Fundamental Law, and then the Fourth Amendment bringing the substance of the Transitional Provisions back to the Fundamental Law after the judgment of the Constitutional Court, provided that the old data protection ombudsman's terms of office shall expire with the entry into force of the Fundamental Law (point 17, Closing and miscellaneous provisions). Unlike the data protection ombudsman, the transitional rules of the Fundamental Law permitted the sitting general ombudsman to stay in office until his term expired (point 16, Closing and miscellaneous provisions).

The Commission commenced accelerated infringement proceedings against Hungary in January 2012 in three cases, the data protection ombudsman's early termination being one of them. In response the 2011 data protection act was amended to introduce safeguards for the independence of the data protection authority. The Venice Commission's opinion on the 2011 data protection act of October 2012 draws on Article 8 of the European Convention, as well as Council of Europe Conventions no. 108 and 205 (which Hungary has ratified). Despite the amendment of the 2011 data protection act, the Venice Commission remained vary that the new data protection authority is appointed by the president of the republic, while Parliament is left out of the appointment process completely (note: the old data protection ombudsman used to be elected by parliament) (para. 36).

The proceedings before the CJEU (Grand Chamber) concerned the narrow issue of the early dismissal of the old data protection ombudsman under the Data Protection Directive, a point where Hungary was unwilling to reconsider its position during the infringement proceedings, when dialoging with the Commission (esp. para. 32). The Commission turned to the CJEU in June 2012. In the case the CJEU said that

> *[i]t is true that Member States are free to adopt or amend the institutional model that they consider to be the most appropriate for their supervisory authorities. In doing so, however, they must ensure that the independence of the supervisory authority under the second subparagraph of Article 28(1) of Directive 95/46 is not compromised, which entails the obligation to allow that authority to serve its full term of office (para 60).*

The CJEU highlighted that the early dismissal of the data protection ombudsman cannot be justified by the overall restructuring of the institution, stressing that the remodeling itself has to meet requirements of independence (para 54): transitional measures have to ensure that the already appointed officer is allowed to serve until the end of the term (para 61). The CJEU's reasoning echoes the opinion of AG Wathelet from December 2013, who considered the security of the tenure of the data protection supervisor to amount to a guarantee of its complete independence required by the Directive.

While the clearcut finding of a violation is a welcome conclusion in the case one cannot but notice that it took over two years to reach this conclusion since the starting of the accelerated infringement proceedings. Although the CJEU found a violation of the requirement of the independence under the Directive, it only addressed the narrow question of the early dismissal of the old data protection ombudsman, and did not tackle the more comprehensive issue of the independence of the new data protection authority. It is of little consolation that the Venice Commission expressed its reservations about the independence of the new Authority and its scope of powers in its opinion on the 2011 data protection act already in October 2012.

The constitutional reduction of the mandate of the ombudsman, as well as the removal of a lawfully elected and appointed official entrusted with the protection of fundamental human rights raise fundamental constitutional questions on the national level. The CJEU was clearly aware of the constitutional gravity of the case, as the Court went as far as reminding that "a Member State cannot plead provisions prevailing in its domestic legal

system, even its constitutional system, to justify failure to observe obligations arising under EU law" (para 35). Still, the judgment of the CJEU was reached on a narrow and technical ground, based primarily on Article 28(1) of the Data Protection Directive. The general principle of legal certainty was addressed in the Opinion of AG Wathelet and also by the CJEU (para 35) on account of the potential remedy (ie. the reinstatement of the old data protection ombudsman), but not as a fundamental consideration. The Court itself indicated that the requirement of independence of the national data protection authority is based on Article 8(3) of the Charter and Article 16(2) TFEU (para 47). The judgment itself, however, is based on the Data Protection Directive, and not directly on the Charter. A less than enthusiastic reader therefore may easily conclude that the CJEU found a technical violation of EU law, and not a fundamental one.

In contrast, the ECtHR left little doubt that it considered Hungary's new legal regulation on the redistribution of church status to be in violation of European minimum standards on the associational aspect of freedom of religion. On account of the Hungarian case the Court elaborated on the practical implications of state neutrality and impartiality in state-church relations, confirming limitations on the powers of the national government to reshuffle an existing legal framework.

With the 2011 church law and subsequent amendments to the Fundamental Law the Hungarian Parliament discontinued the legal recognition of more than 300 previously recognized churches. Under the new rules Parliament selects via a discretionary decision those religious communities which may continue to operate as "incorporated churches." Other religious communities are permitted to operate in a special religious association status. So far 32 such incorporated churches were re-recognized by Parliament. Previously registered churches which were not re-recognized by Parliament under the 2011 church law turned to the ECtHR, challenging various aspects of the regulation and the procedure of re-recognition. As under Hungarian law there was no judicial recourse against the decision of Parliament refusing to re-register a previously recognized church, applicants turned to the ECtHR swiftly, between the fall of 2011 and the summer of 2012.

Hungary has been in an even more intense exchange internally as well as with the Venice Commission on the regulation of church status under the new Fundamental law than with the 2011 data protection act. The ECtHR judgment records the amendments to the 2011 church law, the three major constitutional amendments transforming the Fundamental Law, the decision of the Constitutional Court as well as the opinions of the Venice Commission on the regulation of church status in Hungary on more than 30 pages. The current regime which consists of a higher tier of "incorporated churches" (recognized by Parliament) and a lower tier of "religious communities (registered by court) is the result of a comprehensive amendment passed to the 2011 church law in the summer of 2013. Parliament's decision to grant church status to a religious community ultimately depends on whether Parliament wishes to cooperate with that particular community to jointly perform community goals (Article VII(4) of the Fundamental Law, as amended by the Fifth Amendment).

The chamber judgment of the ECtHR (5-to-2) found that the newly introduced two-tier church de-/re-registration system violates Article 11 in conjunction with Article 9. Although the ECtHR did not consider the discrimination claim under Article 14 in detail in a separate part of the judgment (see paras. 116-118), an anti-discrimination logic inherent in the application of Articles 9 and 11 is readily apparent from the reasoning under Article 11 in conjunction with Article 9. The ECtHR reinforced the fundamental premise of its previous jurisprudence on the centrality of the requirement of neutrality and impartiality "in exercising … regulatory power in the sphere of religious freedom" (para. 76). The Court stressed that the power of the state in this sphere must be used sparingly (paras. 80 and 84), and the government has to demonstrate compelling reasons for the interference (para. 84). The Court acknowledged the diversity of models of state-church relations in Europe (which includes member states with established churches), and emphasized that under the Convention the state's choice of religious partners for cooperation in delivering public interest tasks cannot be arbitrary, and has to be based on transparent criteria (para. 109). The Court reiterated that neutrality is also a requirement when the state allocates monetary resources and related privileges (para. 107), noting that the funding of churches cannot be discriminatory or excessive when compared to other organizations in society (para. 100).

Similarly to the CJEU, the ECtHR was not simply interested in the compatibility of the newly established regulatory framework, but was equally concerned about the changes it introduced to the existing regulatory framework. When examining the new church recognition regime in Hungary, the ECtHR was keen to emphasize

that the lawfulness of the operation of the applicant churches, which were divested of their church status as a result of the 2011 church law (and its subsequent amendments), has not been questioned by the government before (para. 104). In accordance with previous case law, the Court emphasized that the requirement of re-registration of such churches has to meet particularly weighty and compelling reasons (para. 104). In this respect the ECtHR also noted that while preventing disorder and crime was a legitimate aim in regulating state-church relations (para 86), in the case the Hungarian government did not manage to demonstrate that a “less drastic solution” to the problem of “too many churches” in Hungary was not available (para 96).

The ECtHR noted that two-tier systems of church recognition are known in Europe, adding that these typically (“normally”) result from historical arrangements, predating the member states’ entry into the Council of Europe (para. 100). Thereafter the Court found that the newly introduced two-tier system in Hungary does not fully reflect historical traditions, as is also illustrated by the parliamentary record (para. 101). The ECtHR agreed with the Venice Commission that the political discretion inherent in the new Hungarian church recognition regime “carries with it the disregard of neutrality and the peril of arbitrariness” (para 102). Also, the ECtHR found that the differentiation between incorporated churches and religious associations in the Hungarian law (as was also established by the Constitutional Court (6/2013 (III. 1.) AB decision)) is not based on objective grounds (para 112).

A key theme, infusing the reasoning of the ECtHR on multiple issues was that religious communities at the lower tier of recongnition, and their believers, cannot be relegated to second-class citizenship as a result of the administration of the recognition regime. This was emphasized by the ECtHR both on account of the nature of positive obligations in establishing a system of recognition, which provides access to legal entity status (paras. 92-94), and also on account of the co-operation regime between the state and religious communities (para 109).

The lessons from these cases for the Commission’s new proposal for an EU Framework to strengthen the Rule of Law are certainly early and tentative, nonetheless are worthy of reflection. The Commission’s proposal to rely primarily on judicial processes for individual violations, and leave the three-stage monitoring process for systemic concerns needs to be looked at in light of how national scenarios which may come within the new monitoring mechanism develop, as well as, how those court cases unfold.

Similarly to the earlier infringement proceeding in the case of the forced early retirement of judges (C-286/12, Commission v Hungary) the CJEU judgment on the data protection ombudsman is spectacularly technical, despite the admittedly broad implications of an infringement procedure for the reinvented Hungarian data protection regime. Individual cases like this, whether brought by the Commission in infringement proceedings, or by individuals through national courts are unlikely to be able to shatter a government engaging in a systemic undermining of a constitutional regime.

In contrast, the ECtHR judgment on the 2011 church law is certainly much more comprehensive. It is important to point out, however, that it took three seasoned litigators and more than a dozen highly motivated clients, who together raised a range of issues which permitted the Court to reexamine and reinstate the basic premises of its jurisprudence before reaching a conclusion on the Hungarian law. It helped that these cases went directly to the ECtHR due to the lack of a domestic remedy at about the same time, and did not get scattered around on the various levels of the Hungarian judicial system for multiple years before reaching Strasbourg on segmented technical issues. The ECtHR judgment also seized on the momentum built by the Venice Commission’s opinions on the Hungarian law and the provisions of the Fundamental Law. Also, it is unlikely that a similarly compelling judgment would have been possible on a subject where the jurisprudence is less developed or the standard is less clear. Therefore, the ECtHR judgment in this case is more an exception than a rule, when it comes to sizing up the impact individual cases can make to challenge the declining constitutional record of a member state.

A final word on the dialogue component of the envisioned three-stage monitoring process: the Hungarian government has undoubtedly engaged in an exchange with a range of actors (such as the Commission, the Venice Commission and the Constitutional Court) and amended the legal and constitutional rules which were challenged in the two cases. Since the case on the 2011 church laws had been communicated by the ECtHR, the 2011 church law was subject to one major statutory overhaul and two constitutional amendments (the Fourth Amendment, and than the Fifth Amendment, amending the Fourth Amendment) until it reached the shape which

was then invalidated by the ECtHR. These adjustments did not aspire to align the freshly enacted rules with European standards, rather, Hungarian authorities made an effort to find a formulation for their original ideas which they believed was going to comply with the European minimum.

To conclude, the two recent European judgments bring sobering and timely reminders to a freshly reelected Hungarian government on the shortcomings of Hungary's reinvented constitutional framework. At the same time, the two judgments can be read as a timely reality check on some key aspects of the Commission's newly envisioned EU Framework for strengthening the Rule of Law. It appears that for the new mechanism to function, legal expertise is as important as lucky coincidences. So far all that is clear is that European institutions may use petitions challenging various aspects of the constitutional decline in member states to take stock of their own jurisprudence, in the hope that their reminders on the European minimum standards will contribute to piling political pressure on the violators, nudging them to comply. If so, the proposed Framework in its current form is best understood as a collective constitutional learning experiment which is more likely to benefit the instructor and the top students than those who are lagging behind.On April 8, 2014, the Grand Chamber of the European Court of Justice found that Hungary's cutting short the terms of office of its old data protection ombudsman with its new Fundamental Law violated the Data Protection Directive (C-288/12, Commission v Hungary), while the European Court of Human Rights found that Hungary's divesting of several previously registered churches from their church status under its new church law violated the Convention (Magyar Keresztény Mennonita Egyház and others v Hungary). The two judgments came two days after the Hungarian national elections in which the party of PM Viktor Orbán, FIDESz, won an overwhelming majority. While after the electoral victory PM Orbán emphasized that the renewed government will continue its work to preserve the achievements of the recent wave of constitution-making, these recent European judgments are clear reminders that there is still work to be done to bring the reinvented Hungarian constitutional and legal order in line with European minimum standards.

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With the 2011 church law and subsequent amendments to the Fundamental Law the Hungarian Parliament discontinued the legal recognition of more than 300 previously recognized churches. Under the new rules Parliament selects via a discretionary decision those religious communities which may continue to operate as “incorporated churches.” Other religious communities are permitted to operate in a special religious association status. So far 32 such incorporated churches were re-recognized by Parliament. Previously registered churches which were not re-recognized by Parliament under the 2011 church law turned to the ECtHR, challenging various aspects of the regulation and the procedure of re-recognition. As under Hungarian law there was no judicial recourse against the decision of Parliament refusing to re-register a previously recognized church, applicants turned to the ECtHR swiftly, between the fall of 2011 and the summer of 2012.

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The chamber judgment of the ECtHR (5-to-2) found that the newly introduced two-tier church de-/re-registration system violates Article 11 in conjunction with Article 9. Although the ECtHR did not consider the discrimination claim under Article 14 in detail in a separate part of the judgment (see paras. 116-118), an anti-discrimination logic inherent in the application of Articles 9 and 11 is readily apparent from the reasoning under Article 11 in conjunction with Article 9. The ECtHR reinforced the fundamental premise of its previous jurisprudence on the centrality of the requirement of neutrality and impartiality “in exercising … regulatory power in the sphere of religious freedom” (para. 76). The Court stressed that the power of the state in this sphere must be used sparingly (paras. 80 and 84), and the government has to demonstrate compelling reasons for the interference (para. 84). The Court acknowledged the diversity of models of state-church relations in Europe (which includes member states with established churches), and emphasized that under the Convention the state’s choice of religious partners for cooperation in delivering public interest tasks cannot be arbitrary, and has to be based on transparent criteria (para. 109). The Court reiterated that neutrality is also a requirement when the state allocates monetary resources and related privileges (para. 107), noting that the funding of churches cannot be discriminatory or excessive when compared to other organizations in society (para. 100).

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